

# DOMICILE: BASIC PRINCIPLES, COMMON MISCONCEPTIONS & PREPARING FOR THE FUTURE

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Domicile, and in particular whether an individual can maintain a claim to be non-UK domiciled, is of significant importance to numerous taxpayers. For those who successfully cross this hurdle, the opportunities for tax mitigation abound. In this article I set out the basic principles relating to domicile as a matter of English law, dispel some common misconceptions, and indicate how “domicile packs” are a useful way for taxpayers to protect their position for the future.

## Basic Principles

This section contains a summary of the main rules relating to domicile. The position is altered in certain circumstances, but the basic principles are as follows.

The essence of domicile is that it connects a person with the legal system of a particular territory.<sup>1</sup> A person must be domiciled in a particular territory. To this effect, in *Casdagli v Casdagli* [1919] AC 145 Lord Finlay LC said (at page 163):

“I concur with the proposition that there is no such thing as domicil independent of locality. Residence in a particular locality is of the very essence of domicil...”

The need for a person to be domiciled in a territory means that if, for example, Z resides on his 400 ft yacht on the high seas, and intends to do so indefinitely, it is unlikely that he will be domiciled on the yacht *per se*, or in the state where the yacht is registered (assuming he is not otherwise domiciled in that state). As per below, one of the requirements to acquire a domicile of choice is that a person must reside in a territory. However, the prevailing view in public international law appears to be that a vessel on the high seas is not a floating part of the territory of the flag state.<sup>2</sup> Therefore Z is not residing in the flag state by virtue of residing on his yacht. Further, the argument that Z should be treated as residing in the flag state for these purposes, because he is subject to its laws on his yacht, is also unlikely to succeed.<sup>3</sup> Of course, someone who finds himself in Z’s enviable position should take professional advice.

Three concepts govern the place where a person is domiciled, i.e. domicile of origin, domicile of dependency and domicile of choice.

The starting point is to determine a person’s domicile of origin. The basic rule is that a legitimate child born during the lifetime of his father has a domicile of origin in the country in which his father was domiciled at the time of his birth.<sup>4</sup> Domicile of origin is a “fallback” position, but an individual’s domicile can change either by reason of dependency or by choice.

At present the age at which an individual can acquire an independent domicile is 16, unless married earlier.<sup>5</sup> Until that time the general rule is that the domicile of a legitimate child during the lifetime of his father is the same as, and changes with, the domicile of his father.<sup>6</sup> There is an exception to the foregoing rule, which applies when a minor child’s

parents are living apart: in certain circumstances his domicile of dependency may be governed by his mother's domicile.<sup>7</sup>

Every independent person can, upon reaching the age mentioned above, acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise.<sup>8</sup> For a domicile of choice to be acquired both the residence and intention to reside requirements must exist and coincide.

For the purposes of domicile, "residence" has an autonomous meaning, different from that in relation to residence/ordinary residence. In *IRC v Duchess of Portland* [1982] Ch 314 it was stated that residence requires little more than physical presence, but it must be presence as an inhabitant as opposed to as a traveller. In that case the judge indicated that sometimes a short duration of residence in a country can suffice, when accompanied by the necessary intention. However he considered that when a person divides his time between two countries, this is inherently improbable – instead one must look at all the facts to decide which of the two he inhabits. In *IRC v Plummer* 60 TC 425 Hoffmann J (as he then was) preferred a formulation which may be easier to apply, i.e. if a person has two residences the question is which of the two is his chief residence. This depends not only on the length of time spent in each place but also on the quality of the presence.

To satisfy the intention requirement, residence must be general and indefinite in its future contemplation. In cases such as *Winans v Attorney General* [1904] AC 287 the test has been formulated as whether a person intends to "end his days" in a country. Flowing from the basic rule some general propositions can be made:

- A person who determines to spend the rest of his life in a country has the necessary intention even though he does not regard his determination as irrevocable – *IRC v Bullock* 51 TC 522 ("*Bullock*").
- If a person intends to live in a country for a fixed period or limited purpose only then he will not have the necessary intention.
- A person who has no firm plans as to how long he intends to remain in a country but clearly intends to leave at some time will not have the necessary intention – *Qureshi v Qureshi* [1972] Fam 173.
- The fact that a person only envisages the possibility of leaving one day may not be sufficient: it will depend upon the nature of the contingency. *Bullock* is particularly instructive in this regard, and it illustrates that "indefinite" is a strict requirement. The Court of Appeal stated that if a person intends to leave upon the occurrence of a contingency, then he will not have the necessary intention, provided that the contingency is not vaguely defined, and the possibility of it happening is sufficiently substantial rather than unreal. For example, if a person intends to return to his home country at the age of 60 or upon retirement, this is sufficient to negative the intention to make that country his permanent/indefinite home, even though the contingency may never occur. By contrast it is not enough for a person to intend that he will leave if he has "had enough of it", or if he makes a fortune etc.

The burden of proving acquisition of a domicile of choice is on the person who asserts it. Any circumstance which is evidence of a person's residence, or of his intention to reside

permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice.<sup>9</sup>

A person can lose a domicile of choice in a country by ceasing to reside there and ceasing to intend to reside there permanently or indefinitely.<sup>10</sup> Both requirements must be satisfied, i.e. it is not sufficient to give up the residence or the intention alone. Upon loss of a domicile of choice a person might acquire another such domicile in a different state. If, upon losing a domicile of choice, a person does not satisfy the requirements for acquiring such a domicile elsewhere, then his domicile of origin will revive.

### **Common Misconceptions**

There are various misconceptions relating to domicile, and in this section of the article I hope to dispel a few of them.

#### *(a) Domicile of origin is based on place of birth*

It will have been seen above that, as a general rule, a legitimate child has a domicile of origin in the place where his father is domiciled at the time of his birth. This need not be the place where an individual is born.

This can be illustrated by an example. Assume:

- X's father had a domicile of origin in England;
- The father moved to Pakistan for business purposes but did not intend to reside there permanently or indefinitely, and instead intended to return to England; and
- X was born in Pakistan.

In this example X's father will not have acquired a domicile of choice in Pakistan, because he did not intend to reside there permanently or indefinitely. Instead he will have retained his English domicile. Therefore X will have a domicile of origin in England, notwithstanding that he was born in Pakistan.

#### *(b) A person must have resided in a country to be domiciled there*

The above example shows that a person can have a domicile of origin in a country even though he is not born there. Building on this, it can be seen that an adult person might be domiciled in a country he has never even visited.

Assume that, until X reaches the age of majority, his father remains in Pakistan but does not acquire a domicile of choice there, because at no point does he intend to reside there permanently or indefinitely. The father will remain domiciled in England and in turn X remains domiciled in England. If, upon attaining majority, X decides to travel the world and resides in various foreign countries without intending to remain in any of them permanently or indefinitely, he will not acquire a domicile of choice in any of them. As such he would remain domiciled in England even though he was not born in England and had never even visited it.

#### *(c) It is only necessary to look at one previous generation to determine a person's domicile of origin*

As per above, the basic rule is that a person's domicile of origin is governed by his father's domicile at the time of his birth. Nonetheless, in completing the enquiry it is frequently necessary to trace through a number of generations. This can be illustrated by an example. Assume that:

- Y's grandfather, who had an English domicile, moved to India for business purposes but at no point did he intend to reside there permanently or indefinitely;
- Y's father was born in India;
- Upon reaching the age of majority Y's father moved to France and acquired a domicile of choice there;
- Y's father subsequently left France, lost his domicile of choice there, and was then travelling between various countries but without forming the intention to reside in any of them permanently or indefinitely; and
- In turn Y was born outside England.

Y's domicile of origin will be based on his father's domicile at the time when Y was born. However, at the time of Y's birth his father had lost his domicile of choice in France but had not acquired a domicile of choice in any other country. As such, Y's father's domicile at that time will have reverted to his domicile of origin. To determine this it would be necessary to determine Y's grandfather's domicile at the time when Y's father was born.

This shows that in determining a person's domicile of origin it may be necessary to examine more than one generation. In complicated factual matrices one may have to track through numerous generations.

*(d) To be non-UK domiciled a person must positively indicate the country in which he is domiciled*

As a general rule the UK taxing legislation is concerned with whether a person is, or is not, domiciled in the UK.<sup>11</sup> Therefore, to benefit from the advantages available to non-UK domiciled individuals, a person will generally not need to identify the country in which he is domiciled. Instead, it will be sufficient for him to prove that he is not domiciled in the UK. Nonetheless, from a practical perspective it is a significant advantage if a person can point to a foreign country where he actually is domiciled.

### **Domicile Packs & Preparing For The Future**

Often disputes with HMRC about a person's domicile arise long after transactions have occurred, or structures have been put in place, in reliance on non-UK domiciliary status. This is particular so when, after a person has died, it is argued that he was non-UK domiciled so that foreign assets are "excluded property" for IHT purposes (subject, of course, to the deemed domicile rules). However, difficulties which might arise in the future, in proving non-UK domiciled status, can be avoided by taking timely action.

In preparing for the future the first step, of course, is for a person to ensure that he is in fact non-UK domiciled. He should seek professional advice in relation to steps he should take to ensure that this is the case, and ways in which he can strengthen his position. If an adult

resides in a foreign territory and intends to do so permanently or indefinitely he will acquire a domicile of choice in that state, but from a practical perspective he will need evidence to support this. There are numerous steps which might be taken to bolster the position. Examples include having the person's will governed by the law of the foreign country, arranging for him to be buried there, having his primary bank accounts there etc.

Assuming a person is non-UK domiciled, it is advisable for him to prepare a "domicile pack" and regularly update this. By this I mean taking a professional opinion which confirms his domicile status, and which is based on documentary evidence included in the pack. For example, witness statements could be prepared by the person and his family, setting out the background facts and each author's understanding of the taxpayer's intentions. Similarly, copies of wills, bank statements, property title deeds, club memberships etc. can be included in the domicile pack. Such a domicile pack should be updated periodically, taking into account any new evidence, in order to produce a trail of support for the person's non-UK domiciled status. The frequency of preparing new packs would depend on how complicated the facts are and the sums at stake.

Preparing and updating such domicile packs should provide a useful starting point in maintaining a claim to non-UK domiciled status, should a dispute arise in the future. Further, it is a helpful way of marshalling the necessary evidence and ensuring that adequate records are kept, given the difficulties which might arise in the future in gathering together paperwork spanning back over a large number of years.

## Conclusion

In principle it is simple for a person to acquire or lose a particular domicile, but practically difficulties arise in ensuring that there is sufficient evidence supporting a particular domicile. These difficulties can be avoided by preparing for them in advance. For those who succeed, the rewards can be great.

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<sup>1</sup> Para 6-007, *Dicey, Morris & Collins: The Conflict of Laws*; Paras 40000 & 42130 HMRC Supplementary Guidance to HMRC6

<sup>2</sup> Page 318, *Ian Brownlie: Principles of Public International Law (7<sup>th</sup> Ed., 2008)*

<sup>3</sup> In *Casdagli v Casdagli* [1919] AC 145 the House of Lords considered whether a British subject residing in Egypt could be treated as residing in the UK, for the purposes of domicile, given that he was subject to the extra-territorial jurisdiction exercised by Britain in Egypt. Lord Finlay LC stated that the contention was "preposterous".

<sup>4</sup> Rule 9(a), *Dicey, Morris & Collins: The Conflict of Laws*

<sup>5</sup> Section 3 Domicile & Matrimonial Proceedings Act 1973

<sup>6</sup> Rule 15, *Dicey, Morris & Collins: The Conflict of Laws*

<sup>7</sup> This exception was introduced by s.4 Domicile & Matrimonial Proceedings Act 1973.

<sup>8</sup> Rule 10, *Dicey, Morris & Collins: The Conflict of Laws*

<sup>9</sup> Rule 11, *Dicey, Morris & Collins: The Conflict of Laws*

<sup>10</sup> Rule 13, *Dicey, Morris & Collins: The Conflict of Laws*

<sup>11</sup> It may be that this is exclusively so. Confirming this would require an exhaustive search of the legislation.